86-150 (1)

Supreme Court, U.S.
FILED
JUL 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

LILLIAN ZOBEL, by Herbert Z. Hancox and Helen W. Hancox, her guardians,

Plaintiff-Appellee,

v.

LEE FENENDAEL and GLORIA FENENDAEL, his wife,

Defendants-Appellants.

On appeal from the Wisconsin Court of Appeals, District II, following a denial of review by the Wisconsin Supreme Court

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JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

I. Where Wisconsin Law had permitted a competent conservatee to dispose of her property and a competent conservatee gifted her property to another, with notice to the conservator and the court, are the conservatee and donee deprived of due process of law where, after the death of the conservatee, the state's appellate court voids the gift although neither the conservatee nor the donee were timely notified the gift would be challenged? [1]

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1 The parties to the proceeding in the Circuit Court of Fond du Lac County were as follows: Lillian Zobel (plaintiff) was subject to a conservatorship at the time of the gift in issue, but in a later and independent proceeding was subject to a guardianship; her guardians, Herbert Z. Hancox and Helen W. Hancox (brought a foreclosure action as plaintiffs, ostensibly on her behalf yet contrary to her expressed interests); Lee Fenendael and Gloria Fenendael were designated as the donees and defendants at trial.

The plaintiffs appealed to the Wisconsin Court of Appeals, District II, as appellants and the defendants were the respondents. The court of appeals reversed the trial court's judgment so (Cont.)

II. Should the United States Supreme Court remand this case to the Wisconsin Supreme Court and direct it to exercise its appellate jurisdiction when the Wisconsin intermediate appellate court certified the case to the Wisconsin Supreme Court seeking its guidance on the right of a conservatee to dispose of property, the Wisconsin Supreme Court refused the certification, the intermediate appellate court issued a decision voiding the gift of a competent conservatee and the Wisconsin Supreme Court then refused to review that decision?

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the defendants-respondents petitioned the Wisconsin Supreme Court for review as petitioners and the plaintiffs-appellants were designated as respondents before the state supreme court. Following a denial of review, the defendants are appealing to the United States Supreme Court and the plaintiffs are the appellees before this court.

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Plaintiff-Appellee,

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LEE FENENDAEL and GLORIA FENENDAEL, his wife,

Defendants-Appellants.

CERTIFICATE OF INTEREST

The undersigned, counsel of record, certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this court may evaluate possible disqualification or recusal: Lillian Zobel or the Estate of Lillian Zobel (plaintiffs-appellees); Herbert Z. Hancox

(plaintiff-appellee); Helen W. Hancox (plaintiff-appellee); Lee Fenendael (defendant-appellant); and Gloria Fenendael (defendant-appellant); and the following law firms: Colwin, Fortune, Colwin, Pomeroy & English, S.C.; Kersten & McKinnon and Louis R. Ullenberg.

E. Campion Kersten
Attorney of Record for
the Appellants

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OPINION BELOW

This case is a published decision elevated to precedential stature in Wisconsin, reported in the official Wisconsin reports as Zobel v. Fenendael, 127 Wis. 2d 382, 379 N.W.2d 887 (Ct. App. 1985). (The court's slip opinion is included in the appellants' appendix as App. 1)

JURISDICTIONAL BASES FOR SUPREME COURT REVIEW

The United States Supreme Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1257(2), where a Wisconsin court has rendered a final decision interpreting and applying the state's conservatorship statute in such a way as to render it repugnant to both the United States and Wisconsin Constitutions. It is the appellants' position that this case should be reviewed as an appeal. However, if this court decides that an

appeal was improvidently taken we respectfully request that this court regard this jurisdictional statement as a petition for certiorari, pursuant to 28 U.S.C. §§ 1257(3) and 2103.

The United States Supreme Court additionally has jurisdiction pursuant to 28 U.S.C. § 2106, to modify or reverse the Wisconsin Court of Appeals' decision or to remand the cause to the Wisconsin Supreme Court for such further proceedings as may be just under these circumstances. Such action is particularly appropriate in this case since the rights of the conservatee and her donee were defeated, after the conservatee's death, by a decision rendered in an intermediate appellate court, acknowledged to have been made in uncertainty and without the guidance it sought from the Wisconsin Supreme Court, which denied both certification and review.

NATURE OF PROCEEDINGS

This action began as a foreclosure commenced in the Circuit Court for Fond du Lac County in Wisconsin. The case was tried to a jury in March of 1984. The jury found in favor of the defendants and judgment was entered on the jury's verdict on June 21, 1984. The plaintiffs' filed a notice of appeal from the circuit court's judgment with the Wisconsin Court of Appeals, District II, on August 2, 1984. Following briefing and oral argument, the court of appeals certified the case to the Wisconsin Supreme Court on August 14, 1985. (The court's certification to the Wisconsin Supreme Court is included in the appellants' appendix as App. 2.) Certification was denied on October 8, 1985. The court of appeals reversed the trial court's judgment on November 20, 1985. The defendants-respondents

petitioned the Wisconsin Supreme Court for review December 20, 1985 and the Wisconsin Supreme Court denied review April 8, 1986. (The Wisconsin Supreme Court Final Order Denying Review is included in the appellants' appendix as App. 4.) The defendants-respondents now appeal from the November 20, 1985 adverse decision of the Wisconsin Court of Appeals, District II, and the subsequent denial of review by the Wisconsin Supreme Court in an April 8, 1986 final order.

INTRODUCTION

This is an action for foreclosure on a land contract which was commenced to invalidate a gift from Lillian Zobel to Gloria Fenendael forgiving the balance due on a land contract on the grounds that Lillian Zobel was not mentally competent at the time of the gift.

Procedural Status of the Case and Dispositions in the Trial and Appellate Courts

Following a jury trial in which Lillian Zobel was found to be mentally competent at the time of the transaction in issue the trial court entered judgment on June 21, 1984 in favor of the defendants dismissing the foreclosure action, declaring all amounts due under the land contract to be satisfied and vesting title of the property in Gloria Fenendael. (The trial court's written decision on motions after verdict is included in the appellants' appendix as App. 3 and is hereinafter referred to as "Decision.") Decision at 19-20. During the trial at the close of the plaintiffs' evidence, the plaintiffs moved the court to find as a matter of law that when Lillian Zobel forgave the balance due on the land contract she lacked the legal capacity to do so because she was subject

to a conservatorship. A ruling on this motion was deferred until after the trial. On motions after verdict, the plaintiffs moved to amend the complaint to allege the gift was void because of the conservatorship and for judgment notwithstanding the verdict. In denying these motions and ordering judgment in favor of Gloria Fenendael, the trial court ruled that the plaintiffs' motion to amend the complaint was not timely and that there was no legal preclusion in Wisconsin statutory or case law barring a conservatee from disposing of her property. (App. 3, Decision at 15.) The plaintiffs appealed the trial court's judgment to the Wisconsin Court of Appeals.

Following briefing and oral argument, the court of appeals certified the case to the Wisconsin Supreme Court expressly acknowledging that "[s]ection 880.31 [the

conservatorship statute] does not address the power or capacity of a conservatee to dispose of his or her property." (App. 2, Certification at 4.) The court of appeals also concluded that it "is uncertain as to the authority of a conservatee to dispose of his or her property. The statute provides little guidance and the case law is not particularly helpful." (App. 2, Certification at 8.) Accordingly, the court of appeals requested that the supreme court accept jurisdiction to "make the policy decision" that this case required. (App. 2, Certification at 8-9.) The Wisconsin Supreme Court refused certification on October 8, 1985.

On November 20, 1985, the court of appeals issued its decision reversing the trial court and directing judgment in favor of the plaintiffs, holding that a conservatee is legally incompetent to

dispose of her property without approval of the conservator or the conservatorship court, yet acknowledging its decision interpreting the conservatorship statute is anomalous with other Wisconsin statutes. Zobel v. Fenendael, 127 Wis. 2d 382, 395, 396, 379 N.W.2d 887 (Ct. App. 1985). (App. 1 at 20-22.) On December 20, 1985, following the appellate court's reversal of the trial court's judgment, the Fenendaels petitioned the Wisconsin Supreme Court for review of the November 20, 1985 decision of the court of appeals. The supreme court denied review April 8, 1986. (App. 4.) A notice of appeal was filed with the Clerk of the Wisconsin Court of Appeals, District II and the Clerk of the Wisconsin Supreme Court on July 3, 1986. (App. 5.)

The Fenendaels appeal to the United States Supreme Court pursuant to 28

U.S.C. § 1257(2), because the Wisconsin Court of Appeals' decision is repugnant to the Fourteenth Amendment of the Federal Constitution and is contrary to the fundamental rights guaranteed by Article I, section 1 of the Wisconsin Constitution. (The constitutional provisions are fully set forth in the appellants' appendix as App. 7.) The Wisconsin decision curtails heretofore recognized rights of a conservatee to dispose of property and in so doing deprives a conservatee (and in this case the appellants) of both procedural and substantive due process of law contrary to the Fourteenth Amendment. U.S. Const. amend. XIV, § 1. (App. 7.) The Wisconsin decision is also repugnant to one's fundamental right to dispose of property as guaranteed by Article I, section 1 of the Wisconsin Constitution. (App. 7) E.g., Will of

Szperka: Olsewski v. Borek, 254 Wis. 153, 157-58, 35 N.W.2d 209 (1948); Ball v. Boston, 153 Wis. 27, 31-32, 141 N.W. 8 (1913); In re Estate of Eisenberg, 90 Wis. 2d 620, 624, 280 N.W.2d 359 (Ct. App. 1979). Moreover, Wisconsin's conservatorship statute (section 880.31) contains no restrictions whatsoever regarding the legal capacity of a conservatee to dispose of property. (App. 7 at 204.) Accordingly, the court of appeals' decision, after the death of the conservatee, retrospectively requiring the approval of the conservator or the conservatorship court to "validate" a conservatee's disposition of property, effects a procedural and substantive deprivation of the conservatee's heretofore recognized rights to dispose of property and the property rights of the donee. U.S. Const. amend XIV, § 1; Wis. Const. art.

I, § 1. (App. 7.)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are U.S. Constitutional amendment XIV, Wisconsin Constitution, article I, section one and Wisconsin's Conservatorship Statute found in the Wisconsin Statutes section 880.31. The foregoing constitutional and statutory provisions are fully set forth in the appendix to this jurisdictional statement. (App. 7 at 2-4.)

STATEMENT OF THE CASE

A. Factual Background

The parties involved in this case include the guardians of Lillian Zobel (now deceased) who, as a conservatee, had gifted her home to the defendant Gloria Fenendael, by forgiving the balance due on the land contract with which Gloria Fenendael and her husband had purchased

the home. The guardians commenced this action to foreclose on the land contract challenging the validity of the gift solely on the claim Lillian Zobel was mentally incompetent at the time of the transaction. At the time of the gift Miss Zobel was a conservatee but by the time the case was tried to a jury several years later, she was subject to a guardianship (in an independent proceeding) and this suit was brought by her guardians, Herbert Hancox and Helen Hancox (ostensibly on her behalf but contrary to her expressed interests). [2]

This case was tried to a jury in May of 1984. The following facts were presented to the jury and give rise to

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2 Accordingly, this action is brought on behalf of Lillian Zobel by Herbert Z. Hancox and Helen W. Hancox, her guardians, as plaintiff versus Lee Fenendael and Gloria Fenendael as the defendants and donees of Miss Zobel's gift.

the issues on appeal. [3] Gloria Fenendael first met Lillian Zobel when Gloria was a practical nurse and Lillian hired her to care for her invalid sister in the Zobel home in Ripon, Wisconsin. 42/399. [4] Following the death of her sister in February of 1976, Lillian Zobel and Gloria Fenendael continued their friendship and developed a deep fondness for each other. 42/127-28. Lillian Zobel had no remaining relatives in Ripon. 42/401.

When Lillian Zobel decided to sell her home in 1979, Gloria Fenendael and her husband indicated an interest in

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[3] The facts of the case are not in dispute and are contained in the trial court transcript.

4 References to the trial transcript are provided by citation to its designation (as #42) in the Wisconsin court's compilation of the appellate record. Accordingly, the specific page number follows the record notation. (e.g., 42/399).

buying it. Lillian Zobel instructed her attorney to structure the sale to the Fenendaels at a price they could afford saying "I want Gloria to have the house." 42/213-14. Since the purchase price of $57,500 was closer to the appraised value of the home but $10,000 more than the Fenendaels could afford, Lillian Zobel directed her attorney to provide for a purchase price of $57,500, with $12,375 to be paid at the time the land contract was executed and at the same time to arrange for a $10,000 gift from Lillian Zobel to the Fenendaels to be applied toward the down payment. 42/223-25, 229, 230. Lillian told her attorney he should keep the $10,000 gift to the Fenendaels confidential and not tell her relatives (including her nephew, Herbert Z. Hancox). 42/225, 226. The land contract provided it was to terminate four years from the date signed

or six months from Lillian Zobel's death, whichever occurred first. In September of 1981, Lillian Zobel experienced failing physical health and she became concerned that if she were to die leaving Gloria Fenendael only six months within which to finance the balance on the land contract, Gloria could not afford to keep the house because of high interest rates. 42/232, 233. Lillian therefore instructed her attorney to amend the land contract to allow two years following her death within which to pay the balance. 42/233-36. Her attorney testified this amendment to the land contract was a continuation of Lillian Zobel's desire that Gloria Fenendael be able to keep the house. 42/238.

After learning of the amendment to the land contract, Lillian Zobel's nephew, Herbert Hancox of Fort Worth, Texas, came to Wisconsin and retained an

attorney in late November of 1981. 42/343-44. That attorney wrote a new will for Lillian Zobel which she executed on December 16, 1981. 42/345. On the same date, through arrangements made by the same attorney, Mr. Hancox was appointed as Lillian Zobel's conservator. 42/349-51.

In early 1982 Lillian Zobel learned that Gloria Fenendael and her husband had separated and were considering selling their interest in the house because Gloria would be unable to keep up the payments. 42/437-38. Lillian Zobel then summoned her lawyer and advised him she wanted to forgive the balance of the land contract and make a gift of the home to Gloria Fenendael. 42/241. In an extended conference between Lillian Zobel and her attorney on March 8, 1982, Lillian explained to her attorney her reasons for wanting to give Gloria the

house. Lillian and her attorney reviewed the balance in a trust fund in New Jersey from which Lillian received income. 42/242. Lillian told her attorney that Herbert Hancox, her conservator, would not like the fact that she was forgiving the balance on the land contract, but Lillian insisted she wanted to give the house to Gloria and she wanted to get it done with. 42/242-44. The hospital business manager who notarized the deed by which Lillian Zobel forgave the Fenendaels the balance on the land contract also questioned Lillian Zobel on March 8, 1981 concerning how Herbert Hancox would feel about it. Lillian Zobel responded by saying that it was her money, that she could do what she wanted with it and that she wanted Gloria to have the house. 42/84, 85.

Lillian's lawyer, Attorney Schrank, testified that while reviewing the deed

with Lillian on March 8, prior to executing the document, Lillian pointed out to him that the document he had prepared conveyed the property both to Gloria and Lee Fenendael and it was her intention to convey the property only to Gloria Fenendael because of the Fenendaels' contemplated divorce. He redrafted the document accordingly and it was executed on March 9, 1982. 42/248.

All of the people connected with the execution of the document testified at trial that Lillian Zobel fully understood what she was doing when she signed the deed forgiving the balance of the land contract.

Dr. Robert House, Lillian Zobel's personal physician, saw her on a daily basis in the hospital. He testified from his own entries in the hospital record on March 9, 1982 that Lillian had requested a visit from her attorney concerning the

disposition of her home and that she was "lucid" in her presentation of her gratitude toward Gloria Fenendael and what she wanted to do. 42/157. He testified that in his opinion Lillian understood and intended the transaction of March 9, 1982 and that her comments in explaining her desires in this respect were "clear and made sense and were consistent." 42/159. Lillian Zobel's lawyer testified he was absolutely satisfied Lillian Zobel knew what she was doing when she executed the document. 42/263. Joan Kennedy, the hospital business manager who notarized Lillian Zobel's signature on the deed, testified from her own personal notes that she "wanted to be sure" Lillian "knew exactly what she was signing" and that she "posed many different questions to her." 42/84. Joan Kennedy then reviewed all of the ramifications of the transaction with

Lillian to satisfy herself Lillian fully understood the amount involved and the significance of forgiving the balance on the land contract. 42/85-88. She had Lillian Zobel explain to her in her own words what she was doing in executing the document. 42/90. Joan Kennedy testified that in her opinion, when Lillian Zobel signed the deed forgiving the balance on the land contract on March 9, 1982, she understood exactly what she was signing. 42/99. Joanne Pearson, one of the witnesses to Lillian Zobel's signature on the March 9, 1982 document, is a licensed practical nurse and had daily contact with Lillian Zobel in the hospital. She testified Lillian Zobel was very competent (42/118) and that it was "clear that she wanted Gloria to have the house" (42/122). The other witness to Lillian's signature, Bonnie Howell, also a nurse, testified that at the time

in question Lillian Zobel knew what she wanted, that she was precise and competent and that when she signed the document she understood what she was doing. 42/130-32. A number of other hospital employees testified to Lillian Zobel's alertness and competence during the time in question. 42/124-27, 134-43.

Within three days after the deed was signed but before it was delivered to Gloria Fenendael, Lillian Zobel's attorney notified the Hancoxes' attorney that Lillian had signed a deed forgiving the Fenendaels the balance due on the land contract. He explained the circumstances surrounding Lillian's desire to make the gift to Gloria Fenendael and the circumstances surrounding the actual execution of the document. 42/265-66. On that same day Lillian's attorney conferred with Judge Eugene McEssey, the presiding judge in

the conservatorship proceeding. He advised Judge McEssey of the document Lillian Zobel had signed and the reasons for it. He also requested that the court interview Lillian Zobel concerning her determination to make the gift. 42/266. No action was taken by the judge of the conservatorship court nor did the conservator, Herbert Hancox, who had been notified of the Zobel gift, challenge the gift in the conservatorship court.

Upon the evidence received at trial, the jury found that Lillian Zobel was mentally competent at the time she executed the deed on March 9, 1982.

At the close of the plaintiffs' case at trial the Hancoxes raised (for the first time) the issue of legal incompetence, claiming that Miss Zobel's status as a conservatee legally barred her from disposing of her property. Since the plaintiffs, though informed of

the gift, had not challenged it in either the conservatorship or guardianship proceedings and had brought the case to trial only on the issue of mental competency, without raising the legal issue of the effect of the conservatorship either in their pleadings or by motion as required by statute, the trial court ordered that the trial proceed to verdict on the issue of mental competency. The jury rendered a verdict in favor of the defendants, finding that Lillian Zobel was mentally competent at the time of the transaction in question.

On motions after verdict, the trial judge held there was no existing law in Wisconsin legally barring a conservatee from disposing of her property and, based upon the jury's finding of mental competence, entered judgment on the verdict in favor of the Fenendaels. (App. 3, Decision at 18-19.) [5] The

plaintiffs appealed to the Wisconsin Court of Appeals, District II, which, after briefing and oral argument, certified the case to the Wisconsin Supreme Court requesting its guidance because of its uncertainty on the issue of a conservatee's legal right to dispose of property. Wisconsin Court of Appeals Certification to the Wisconsin Supreme Court at 8 (citing Wis. Stats. § 880.31). [6] The Wisconsin Supreme Court refused certification. The Court of Appeals reversed the trial court and held, for the first time in Wisconsin

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5 The trial court rendered its written decision on motions after verdict (hereinafter referred to as "Decision") which appears in the appellants' attached appendix as App. 3.

6 The Wisconsin Court of Appeals, District II, certification requesting that the Wisconsin Supreme Court accept jurisdiction is hereinafter referred to as "Certification" and is included in the appellants' attached appendix as App. 2.

that a conservatee is legally precluded from gifting her property. Zobel v. Fenendael, 127 Wis. 2d 382, 396, 379 N.W.2d 887 (Ct. App. 1985) (App. 1 at 20-22.) Between the time of the trial and the appeal to the Wisconsin Court of Appeals, Lillian Zobel died. The defendants-respondents petitioned the Wisconsin Supreme Court for review which was denied on April 8, 1986. (App. at 4.) Accordingly, the Fenendaels (the defendants) appeal to the United States Supreme Court from an adverse decision of the Wisconsin Court of Appeals, District II, finalized by the Wisconsin Supreme Court's denial of their petition for review.

B. Procedural facts regarding failure to raise legal issue of whether the gift was void because of the conservatorship

It is uncontroverted the plaintiffs never raised the issue of the legal

effect of the conservatorship on the transaction before trial in their pleadings or by motion. In their complaint, filed September 24, 1982, the plaintiffs challenged the March 9, 1982 transaction only on the grounds that Lillian Zobel was not competent to enter into that transaction. The complaint made no reference to the conservatorship. No summary judgment or other pre-trial motion was brought by the plaintiff referring to the legal effect of the conservatorship on the March 9, 1982 transaction. The pleadings, discovery and trial preparation related solely to whether Lillian Zobel was either mentally incompetent or unduly influenced [7] at the time in question.

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7 At the trial the plaintiffs withdrew the claim of undue influence.

Wisconsin's conservatorship statute expressly provides that "[a]ppointment of a conservator shall not be evidence of the competency or incompetency of the person whose estate is being administered." Wisconsin Statutes § 880.31(6) (emphasis supplied) (App. 7 at 4.) Accordingly, there was nothing in Wisconsin statutory or case law requiring or even suggesting that a conservatee was legally incompetent to dispose of her property. Moreover, the Hancoxes and their attorney did not obtain a hearing before the court presiding over the conservatorship or the court presiding over the subsequent guardianship seeking to nullify the March 9, 1982 transaction. The court in the conservatorship and guardianship proceedings neither approved nor disapproved the transaction in issue. 42/343.

During the trial, after the plaintiffs had rested and after the defendants had presented a substantial portion of their case, the plaintiffs, for the first time, moved the court to hold that the transaction in question was void as a matter of law because of the conservatorship. 42/384. Following the verdict the plaintiffs moved to amend the pleadings to assert Lillian Zobel's legal incapacity to enter into the transaction because of the conservatorship and for judgment notwithstanding the verdict on the same grounds. These motions were denied by the trial court and judgment was ordered in favor of the donee, Gloria Fenendael.

C. Statement on raising of questions sought to be reviewed

There was no occasion or need to raise the constitutional issues sought to be reviewed herein in the trial court

because the plaintiff's complaint and evidence at trial challenged the transaction in question only on the grounds of mental incompetency and the trial court accepted defendants' argument that the post-trial challenge to the transaction on the grounds of legal incompetency because of the conservatorship was not timely raised. This issue was raised in the trial court in the Fenendaels' brief in support of their motion for judgment on the verdict, in which they argued that because of the plaintiff's failure to raise the issue that the transaction was void because of the conservatorship in pleadings or by pretrial motion and the failure to challenge the transaction either in the conservatorship or guardianship proceedings, the Fenendaels were deprived of timely notice and opportunity to meet that issue. The trial court agreed with

this contention and found that the defendants had been prejudiced by the plaintiff's failure to raise this issue in a timely manner. App. 3, Decision at 13.

Nor was there necessity or occasion to specifically raise these constitutional issues in the Wisconsin Court of Appeals since that court had not yet voided the transaction effecting the deprivation of rights without due process sought to be reviewed in this appeal. These issues were raised in the Wisconsin Court of Appeals in the Fenendaels' brief in which they argued that the trial court properly ruled they had been prejudiced by the failure of the plaintiffs-appellants to timely notify the defendants-respondents of their challenge to the conservatee's legal competency to gift the property because of the conservatorship. In their brief to the

Wisconsin Court of Appeals the defendants-respondents also cited and referred to the fundamental civil right of an individual to dispose of property that would be defeated if the trial court were not affirmed. The Wisconsin Court of Appeals, by its decision of November 20, 1985, reversed the trial court and voided the gift thus effecting the deprivation of rights sought to be reviewed herein.

The defendants-respondents did specifically raise the issues sought to be reviewed herein in their December 20, 1985 petition to the Wisconsin Supreme Court to review the decision of the Wisconsin Court of Appeals. (App. 6.) Among the reasons presented by the defendants in their petition for review was the argument that the decision by the Wisconsin Court of Appeals voiding the gift on the grounds that the donor was a

conservatee at the time of the gift effected an unconstitutional deprivation of rights without due process. (App. 6.) The Wisconsin Supreme Court did not address either these or any other issues raised in the petition for review and denied review in its order of April 8, 1986.

SUBSTANTIALITY OF THE QUESTIONS PRESENTED

I. A competent conservatee and her donee have been deprived of constitutionally guaranteed rights without due process when an appellate court voids the conservatee's gift after her death because she was subject to a conservatorship, where state law permitted such a gift at the time it was made and neither the conservatee nor the donee were given timely notice the gift would be challenged even though the conservator and the court were notified of the gift.

A conservatorship is a creature of statute which is the sole source of authority establishing the rights and duties of the conservator, the conservatee and the conservatorship

court. Wis. Stats. § 880.31. (App. 7 at 2-4.) The conservatorship process is voluntary and the statute expressly states that "[a]ppointment of a conservator shall not be evidence of the competency or incompetency of the person whose estate is being administered. Wis. Stats. § 880.31(6) (emphasis supplied) (App. 7 at 4.)

At the time of the gift, there was no existing Wisconsin law restricting the powers of a conservatee to dispose of property. See Certification at 6. (App. 2.) Accordingly, when Lillian Zobel decided to forgive the balance due on the land contract, directed her lawyer to draft the documents to effect the gift and executed those documents, neither she nor her lawyer had reason to believe she was legally ineligible to do so. Both the conservator and the conservatorship court were informed of the gift shortly

after it occurred. Yet, from the time of the gift through the time Lillian Zobel was later declared incompetent in the guardianship proceedings arranged for by the Hancoxes, no one questioned Lillian Zobel's legal capacity, as a conservatee, to make the gift. Through the time of Lillian Zobel's death, the law applied by the trial court, permitting a competent conservatee to dispose of her own property, remained the law of Wisconsin.

No approval was necessary from the conservators or the conservatorship court and the conservators chose not to challenge the validity of that transaction before the conservatorship court. Instead, they chose the forum of the circuit court in a foreclosure action nearly five months later to invalidate

the gift on the grounds of mental incompetency and undue influence. [8]

The court of appeals decision voiding the gift after the death of the conservatee by holding, retrospectively, that even a competent conservatee cannot dispose of property outside the conservatorship, defeated the pre-existing right of the conservatee to dispose of her property and the property rights of the donee with neither having had the notice and opportunity for a hearing required by the Due Process Clause. U.S. Const. amend. XIV. This court has repeated that:

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or

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8 There was no evidence whatsoever to support the undue influence claim and the plaintiffs witndrew it at the close of their case.

> property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

Logan v. Zimmerman Brush Co., 445 U.S. 422, 428 (1950); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

Even if court approval should be regarded as necessary to a valid gift on the part of a conservatee, the trial court's judgment in this case vesting title of the real estate in Gloria Fenendael's name constituted such approval. The evidence in the record established that the conservatee could afford, financially, to forgive the balance due on the land contract and that it was her well-considered and competent intent to do so. Had the conservatee or the donee been given timely notice of the need to do so, they could have presented this same evidence to the conservatorship court.

They could have presented testimony of her conservators' selfish motives in attempting to invalidate the transaction, submitting the matter for the court's approval in March of 1982. Moreover, had the conservatorship court failed to approve the transaction, Miss Zobel could have petitioned the conservatorship court to terminate her conservatorship pursuant to section 880.31(4), and gifted the property to the Fenendaels upon termination of her conservatorship. (App. 7 at 3.)

Without any notice or an opportunity for hearing, the conservatee was deprived of her right to dispose of her property, resulting in the court of appeals undoing what she had clearly intended to do in gifting her property. Miss Zobel and the Fenendaels have been denied their due process rights with no remedy whatsoever since Miss Zobel is now deceased. There

can be no accommodation of these rights if this decision is affirmed.

The court of appeals' decision effectively permitted the conservatee and the donee to be trapped out of their rights. The conservatee competently intended and effected a gift valid under the then existing law, and then timely notified the conservator and the conservatorship court even though such notice was not required by Wisconsin Law. The court of appeals' decision reversing the trial court and voiding the gift after the conservatee's death on an ex post facto basis destroyed fundamental rights which could have been protected had the conservatee or the donee been given timely notice or opportunity. This court has stated:

> To put it as plainly as possible, the State may not finally destroy a property interest without first giving the putative owner an

> opportunity to present his claim of entitlement.

Logan v. Zimmerman Brush Co., 455 U.S. 422, 434 (1982); Bell v. Burson, 402 U.S. 541 (1971).

The necessity for review by this court is particularly urgent here because the intermediate state appellate court that voided the gift did so with acknowledged uncertainty, effecting an admittedly harsh result inconsistent with state statutes; and the highest court of the state refused both a pre-decision request for guidance and post-decision review. (See Certification, App. 2.) Unless reviewed, the deprivation of rights caused by the appellate court's decision will be final.

The court of appeals did not remand the matter to the trial court for further proceedings. Zobel v. Fenendael, 127 Wis. 2d, n.13 at 396, 379 N.W.2d 887 (Ct.

App. 1985) (App. 1 at 28-29). It simply voids the transaction retrospectively, reversing the judgment entered on the jury's verdict. Id. at 395 (App. 1 at 22).

II. SINCE THE STATE SUPREME COURT REFUSED TO REVIEW THE UNCONSTITUTIONAL DEPRIVATION OF DUE PROCESS CAUSED BY THE STATE INTERMEDIATE APPELLATE COURT DECISION, AN APPEAL TO THE UNITED STATES SUPREME COURT CONSTITUTES THE ONLY AVAILABLE APPELLATE REVIEW. UNDER THE CIRCUMSTANCES OF THIS CASE, THIS COURT SHOULD REVERSE THE ORDER OF THE INTERMEDIATE APPELLATE COURT OR, AT LEAST, REMAND THE CAUSE TO THE WISCONSIN SUPREME COURT FOR REVIEW PURSUANT TO 28 U.S.C. § 2106.

The trial court, applying existing Wisconsin Law, which did not limit a conservatee's right to dispose of property, entered judgment in Gloria Fenendael's favor based on the jury's finding of Lillian Zobel's competence at the time of the gift.

The defeat of Lillian Zobel's right to dispose of her property and the

deprivation of Gloria Fenendael's ownership of that property, all without due process, occurred when the Wisconsin intermediate appellate court, after Lillian Zobel had died, reversed the trial court, voided the gift and ordered judgment of foreclosure in favor of the guardians. Following the adverse decision of the intermediate appellate court, Gloria Fenendael timely filed with the Wisconsin State Supreme Court a petition for a review of the intermediate appellate court's decision pursuant to Wisconsin Statutes section 809.62. In that petition, she raised the constitutional issues presented by the intermediate appellate court's decision and petitioned the Wisconsin State Supreme Court to consider whether, under the circumstances of this case, the intermediate appellate court's decision resulted in an unconstitutional

deprivation of fundamental rights without due process. (See portion of petition for review in appellants' appendix, App. 6.) This reason for review by the supreme court was additional to other stated grounds warranting review, including the reasons that the intermediate court of appeals, in its attempt at certification to the state supreme court, had expressed uncertainty and the need for supreme court guidance on the issues involved, that the intermediate appellate court acknowledged the harshness of its decision and its inconsistency with other existing state statutes and the fact that in its decision, the intermediate court was enunciating a new policy regarding conservatorships, a function ordinarily reserved for the state supreme court. But the Wisconsin Supreme Court refused to review the decision of the

intermediate appellate court and, since a rehearing on a denial of a petition for review to the state supreme court is not permitted (Archdiocese of Milwaukee v. City of Milwaukee, 91 Wis. 2d 625, 627, 284 N.W.2d 29 [1979]) the decision of the intermediate appellate court became final. Accordingly, we must look to the United States Supreme Court as the only available body for appellate review of the issues raised herein.

In addition to and, perhaps, as part of the constitutional basis for appellate review by this court, this case falls within the jurisdictional principles stated by this court in Minnesota v. National Tea Co., 309 U.S. 551 (1940) as follows:

> This Court has frequently held that in the exercise of its appellate jurisdiction it has the power not only to correct errors of law in the judgment under review but also to make such disposition of the case as

> justice requires . . . That principle has been applied to cases coming from state courts where supervening changes had occurred since entry of the judgment . . . and where the grounds of the state decision were obscure. . . .
>
> But it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of the state action.

Id. 555, 557. (Emphasis supplied). As stated above, the intermediate appellate court's decision voiding the gift solely because of Lillian Zobel's status as a conservatee represents a change from the law both as of the time of the transaction in question and the time of the judgment entered by the trial court. The ambiguity and obscurity of the intermediate appellate court's adjudication herein is demonstrated by that court's own acknowledgment that its decision is "anomalous" with other

statutes in related areas.
(Certification, App. 2 at 8.)

Under the intermediate appellate court's decision, a gift by a competent conservatee outside the conservatorship is void even where such a gift is well-considered and the conservator objects to the gift out of selfish motivation or for other reasons contrary to the interests of the conservatee. Certainly, Wisconsin Statutes section 880.31, the statute creating conservatorship proceedings and the only statute discussing the powers and authorities of conservators and conservatees does not render void a gift such as Lillian Zobel made in this case. Further, the only Wisconsin appellate decision prior to this case discussing conservatorships held it should not be necessary for a conservatee to terminate the conservatorship, make the desired disposition of property and

then re-establish the conservatorship in situations where the conservatee desires to dispose of property outside the conservatorship. Estate of Evans, 28 Wis. 2d 97, 101, 135 N.W.2d 832 (1965).

Equally important is the precise anomaly acknowledged by the Wisconsin Court of Appeals as being caused by its decision. (Certification, App. 2 at 8.) Under Wisconsin Statues section 880.215, relating to limited guardianships, wherein a ward is presumed incompetent, "the validity of a contract made by a person under limited guardianship is not void, however, unless the determination is made by the court in its findings under section 880.33(3) that the ward is incapable of exercising the power to make contracts." (Emphasis supplied). Further, under section 880.33(3), a ward in a limited guardianship is allowed to convey property.

Thus, under the court's decision, the personal freedom of a conservatee (not presumed incompetent under the conservatorship statute) is more limited that that of a ward in a guardianship wherein incompetency is presumed. Considering the only Wisconsin statute dealing with conservatorships, the only other Wisconsin appellate decision discussing conservatorships and the fact that under Wisconsin limited guardianship statutes, transfers of property by a ward are not void but only voidable upon a showing of factual incompetency, this decision by the Wisconsin intermediate appeals court, refused to be reviewed by the state supreme court, is contrary to the "body" of related Wisconsin law. When this court has found a portion of a body of state law, as interpreted or applied by a state court, to be offensive to the Due Process Clause it has remanded

the cause back to the state supreme court so that the state supreme court is given an "opportunity to deal with this ultimate issue of federal law and with any state law questions relevant to it." Musser v. State of Utah, 333 U.S. 95, 97, 98 (1948).

CONCLUSION

We would hope that on accepting this appeal this court would reverse the Wisconsin Court of Appeals' decision and reinstate the judgment of the trial court so that the competent, intended disposition by Lillian Zobel of her own property and the property rights of Gloria Fenendael are preserved. At least, we would seek in this appeal to have the cause remanded to the Wisconsin Supreme Court which should have exercised its appellate jurisdiction for the reasons stated above.

A dismissal of this appeal would mean that Gloria Fenendael will have had no appeal from the voiding of the gift effected by the decision of the Wisconsin intermediate court of appeals. To avoid this injustice we ask this Court to accept this appeal at least to follow the procedure used by this court in Missouri, ex rel Wabash Railway Company v. Public Service Commission, 273 U.S. 126 (1927) wherein this Court in remanding the cause back to the state court for further proceedings noted:

> While this court may decide these questions, it is not obliged to do so, and in view of their nature, we deem it appropriate to refer the determination to the state court. . . . In order that the state court may be free to consider the question and make proper disposition of it, the judgment below should be set aside, since a dismissal of this appeal might leave the judgment to be enforced as rendered.

Id. at 131. Accordingly, and in conclusion, we appeal to this Court at least to remand this case for proper appellate review back to the Wisconsin Supreme Court which once stated:

> There is the high place, in contemplation of the fundamental principles of civil life, which the right of individual liberty to dispose of one's property by contract or will, - holds. It is not the business of courts to undo what an old person may have done with his property, because of judicial notions of propriety or moral obligations, in a case of this sort, or the wishes of relatives, however deserving. Did the man do freely what he wanted to do and was competent to decide upon? These are the sole questions.

In re Estate of Bauer, 264 Wis. 556, 561, 59 N.W.2d 481 (1956) (quoting Boardman v. Lorentzen, 155 Wis. 566, 579, 145 N.W. 750 (1915).

Dated at Milwaukee, Wisconsin, this 3rd day of July, 1986.

Respectfully submitted,

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No.

IN THE SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1985

LILLIAN ZOBEL, by Herbert Z. Hancox and Helen W. Hancox, her guardians,

Plaintiff-Appellee,

v.

LEE FENENDAEL and GLORIA FENENDAEL, his wife,

Defendants-Appellants.

CERTIFICATE OF SERVICE

I, E. Campion Kersten, a duly licensed attorney at law admitted to the Bar of the United States Supreme Court, hereby certify that three true and correct copies of the appellants' jurisdictional statement, including a certificate of interested persons and the appendix to the jurisdictional statement, were served, pursuant to Rule 28, by

depositing the foregoing documents in a United States Post Office or Mailbox in Milwaukee, Wisconsin, with first-class postage prepaid, this 7th day of July, 1986 addressed to the appellee's counsel of record at his post office address as follows:

David J. Colwin, Esquire
Colwin, Fortune, Colwin,
Pomeroy & English
201 South Marr Street
P. O. Box 1476
Fond du Lac, Wisconsin 54935

_____
E. Campion Kersten

Subscribed and Sworn to
before me this 7th day
of July, 1986.

_____
Notary Public, State of Wisconsin
My commission _____.